LOH ENG LEONG & ORS

v.

LO MU SEN & SONS SDN BHD & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ARIFIN JAKA JCA
ABDUL WAHAB PATAIL J
[CIVIL APPEAL NO: A-02-661-1998]
24 MARCH 2004

CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - Defendants defying order of Court of Appeal - Order made by Court of Appeal upon reversing decision of High Court - Whether plaintiffs' application to Court of Appeal to commit defendants misconceived - Whether Court of Appeal lacked jurisdiction to entertain application - Whether application should have been made before High Court - Whether High Court the proper forum seised with the jurisdiction*

Before the High Court at Taiping, the plaintiffs had earlier applied to have the share register of the 1st defendant company rectified. The High Court refused the application and the plaintiffs appealed to the Court of Appeal which allowed the appeal and ordered the rectification sought ('the CA order'). The defendants, however, did not comply with the CA order and the plaintiffs filed the instant motion *(ex parte)* before the Court of Appeal for leave to apply for an order of committal against the defendants. The issue central to the instant motion was whether the Court of Appeal had the jurisdiction to entertain the plaintiffs' application to commit the defendants.

Held

Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] When the Court of Appeal acts in its appellate jurisdiction, any order that it makes is an order that ought to have been made by the High Court. That is the historical consequence of the jurisdiction which evolved in England through the process of the writ of error in the 19th century. Consequently, the CA order made by the Court of Appeal had to be enforced by the court which ought to have made it, namely, the High Court. (p 677 f-g)

[1a] The position would, however, be quite different if the order sought to be enforced was one that was made within the limited original-jurisdiction of the Court of Appeal under s. 44 of the Courts of Judicature Act 1964. (p 678 e)

[Motion withdrawn by plaintiffs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif-plaintif sebelum ini telah membuat permohonan di Mahkamah Tinggi Taiping bagi membetulkan daftar saham syarikat defendan pertama. Mahkamah Tinggi menolak permohonan dan plaintif-plaintif merayu ke Mahkamah Rayuan yang membenarkan rayuan sekaligus memerintahkan pembetulan dibuat seperti dipohon ('perintah MR'). Defendan-defendan bagaimanapun tidak mematuhi perintah MR dan plaintif-plaintif memfailkan usul semasa *(ex parte)* di Mahkamah Rayuan bagi kebenaran untuk memohon perintah komital terhadap defendan-defendan. Isu penting yang berbangkit adalah sama ada Mahkamah Rayuan mempunyai bidang kuasa untuk melayani permohonan plaintif-plaintif untuk memenjarakan defendan-defendan.

Diputuskan
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Apabila Mahkamah Rayuan membuat keputusan berasaskan bidang kuasa rayuannya, apa-apa perintah yang dibuat olehnya adalah perintah yang sepatutnya dibuat oleh Mahkamah Tinggi. Inilah akibat sejarah dari bidang kuasa yang berkembang di England melalui proses kekhilafan writ di kurun ke 19. Oleh yang demikian, perintah MR yang dibuat oleh Mahkamah Rayuan harus dikuatkuasakan oleh mahkamah yang sepatutnya membuat perintah tersebut, iaitulah Mahkamah Tinggi.

[1a] Kedudukan, bagaimanapun, akan berubah jika perintah yang hendak dikuatkuasakan itu adalah suatu perintah yang dibuat oleh Mahkamah Rayuan mengikut bidang kuasa asal terhadnya di bawah s. 44 Akta Mahkamah Kehakiman 1964.

Usul ditarik balik oleh plaintif-plaintif.]

Case(s) referred to:
Fortescue v. McKeown & Ors [1914] 1 IR 30 ***(refd)***
Re Cook & Other Application (No 2) [1986] NI 283 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 44

For the appellants - Cecil Abraham (Yee Mei Ken); M/s Shearn Delamore & Co
For the respondents - Bastian Vendargon (V Kalearasu, NK Yong & Aisha Mubarak); M/s Kim & Assoc

[Appeal from Originating Summons No: 24-51-1998 (T)]

Reported by Gan Peng Chiang

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

This motion which is before us today came before a differently constituted bench of this court on 8 March 2004. The motion is for leave to apply for a committal order against the respondents for breach of an order made by this court on 26 July 2001. In order to appreciate the points taken before us, it is important to hearken to the factual background.

On 11 September 1998 the High Court at Taiping dismissed the appellants' application for rectification of the share register of the first respondent. An appeal was brought to this court. It succeeded. As we have just observed this court by its order dated 26 July 2001 directed rectification. The appellants' complaint is that that order has been flouted by the respondents. They want to punish the respondents for contempt of court.

When Dato' Cecil Abraham appeared before this court on 8 March 2004 we put it to him that we have no jurisdiction to entertain this application. In our view the proper forum seised with the jurisdiction is the High Court at Taiping. The reasons are quite obvious.

When this court acts in its appellate jurisdiction, any order that it makes is an order that ought to have been made by the High Court. This is the historical consequence of the jurisdiction which evolved in England through the process of the writ of error in the 19th century. It follows that any order made by this court in its appellate jurisdiction must go to be enforced by the court that ought to have made the order, namely, the High Court.

With customary frankness, Dato' Abraham conceded that the authorities are against him. He has assisted us by referring to two Irish cases. The first is *Fortescue v. McKeown and Others* [1914] 1 IR 30. The issue in that case was whether the Master of the Rolls sitting at first instance had jurisdiction to issue a writ of attachment in dealing with the order of the Court of Appeal. The Lord Chancellor said:

> We are all of opinion that the Master of the Rolls had jurisdiction to make the order which the plaintiffs seek. We are dealing with the case on appeal from the Master of the Rolls, and as we consider that he would have rightly exercised his discretion and directed the writ to issue if he had considered that he had jurisdiction to do so, we will now reverse the order made by him, and direct that a writ of attachment do issue against each of the defendants for disobedience of the order of the 24th April, 1913.

The decision in *Fortescue v. McKeown and Others (supra)* was approved by Hutton J in *Re Cook and Others Application (No 2)* [1986] NI 283. That was also a case in which the applicant was seeking to enforce in the Queen's Bench of the High Court of Northern Ireland an order of the Court of Appeal of that jurisdiction. This is what Hutton J said in respect of the application:

> Although the present application relates to breaches of the order of the Court of Appeal and not to breaches of the order of the High Court, it is appropriate for this application to be brought before the High Court and not before the Court of Appeal – see *Fortescue v. McKeown* [1914] 1 IR 30 and *Pott v. Stutley* [1935] WN 140.

The position would be quite different if the order sought to be enforced was one made within the limited original jurisdiction of this court under s. 44 of the Courts of Judicature Act 1964. Thus, had there been a refusal in the High Court in a particular case, eg, to grant an injunction and the unsuccessful applicant had approached this court under s. 44 and obtained an injunction by way of interim protection, any breach of that injunction could be properly enforced by this court.

But, as we have already pointed out that is not the case here. Accordingly, at our suggestion, Dato' Abraham elected to withdraw his application. Being an *ex parte* motion, no question of costs arises. None were ordered.